1907
June 22.

APPELLATE CIVIL.

Before Mr. Justice Richards.

KASHI (PLAINTIFF) *v.* BAJRANG PRASAD (DEFENDANT).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 92 *and* 94—*Mortgage —Redemption—Subsequent suit for profits received by mortgagee barred.*

In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee right up to the time of actual redemption or sale, as the case may be. A mortgagor therefore who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession, which might and ought to have been taken into account at the time of passing the decree. *Vinayak Shivrao Dighe* v. *Dattatraya Gopal* (1) referred to.

THE facts of this case are as follows:—In the year 1902 the plaintiff sued for redemption of certain mortgaged property. A decree was obtained on the 17th of December 1902. On appeal the amount decreed for redemption was increased, but the decree was confirmed on the 3rd of February 1903. The plaintiff paid what was due according to the decree and got possession some time in the earlier part of the year 1903. The present suit was then instituted by the plaintiff to recover certain money which he alleged was due by the defendant: he said the defendant received certain rents out of the property from August 1902 to March 1903. The Court of first instance (Munsif of Farrukhabad) decreed the plaintiff's claim in part. On appeal, however, the lower appellate Court reversed the decree of the Court of first instance and dismissed the suit altogether. The plaintiff thereupon appealed to the High Court.

Mr. *M. L. Agarwala* and Munshi *Gulzari Lal*, for the appellant.

Pandit *M. L. Sandal* and Lala *Kedar Nath*, for the respondent.

RICHARDS, J.—The facts out of which this appeal arises are shortly as follows:—In the year 1902 the plaintiff sued for redemption of certain mortgaged property. A decree was obtained on the 17th of December 1902. On appeal the amount decreed for redemption was increased, but the decree was

* Second Appeal No. 1147 of 1905, from a decree of Raj Nath Prasad, Subordinate Judge of Farrukhabad, dated the 16th of August 1905, reversing a decree of Upendro Nath Sen, Munsif of Fatehgarh, dated the 25th of May 1905.

(1) (1902) I. L. R., 26 Bom., 661.

confirmed on the 3rd of February 1903. The plaintiff paid what was due according to the decree and got possession some time in the earlier part of the year 1903. The present suit was then instituted by the plaintiff to recover certain money which he alleged was due by the defendant: he says the defendant received certain rents out of the property from August 1902 to March 1903. During the time that these alleged profits were received by the defendant, he was undoubtedly in possession of the property as mortgagee, and it is impossible to deny that the present suit is a suit for a further settlement and adjustment of accounts between the plaintiff and the defendant occupying the positions of mortgagor and mortgagee. The plaintiff contends that what he is sued for was not covered by the previous accounts between the parties, and according to the judgment of the Court of first instance this allegation is not without foundation. It is contended, however, on behalf of the defendant, that the present suit cannot be maintained. There is no doubt that the settlement of account between the plaintiff and the defendant, (that is, the amount for which each was liable to account) was directly and substantially in issue in the previous suit. I think it absolutely clear that in a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee, right up to the time of actual redemption or sale as the case may be. Section 92 of the Transfer of Property Act provides that in a redemption suit the Court is to pass a decree ordering that an account be taken of what *will be* due to the defendant upon a date to be fixed by the Court, when clearing the amount to be due. Section 94 speaks of the final adjustment of the amount to be paid by a mortgagor in case of redemption. In the case *Vinayak Shivrao Dighe* v. *Dattatraya Gopal* (1). Jenkins, C.J., makes some very cogent remarks as to what ought to be the result, between parties, of accounts in mortgage suits. I entirely agree with these remarks, and in my judgment the claim of the plaintiff in the present case could and ought to have been settled in the previous litigation and that a separate suit does not now lie. I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 26 Bom., 661.

Before Mr. Justice Banerji and Mr. Justice Aikman.

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June 27.

RADHA BAI (PLAINTIFF) *v.* KAMOD SINGH AND OTHERS (DEFENDANTS).*

Act No. XVI of 1882 *(Jhansi Incumbered Estates Act), sections* 8 *and* 28—*Mortgage—Unlawful consideration—Act No. IX of* 1872 *(Indian Contract Act), section* 23—*Act No. IV of* 1882 *(Transfer of Property Act), section* 43.

Held that a mortgage executed by a mortgagor who was at the time disqualified under section 8 of the Jhansi Incumbered Estates Act, 1882, was a contract entered into for an unlawful consideration within the meaning of section 23 of the Indian Contract Act, and that section 43 of the Transfer of Property Act, 1882, could not be prayed in aid to empower the mortgagee to bring a suit for foreclosure after the mortgagors' disability had ceased.

THIS appeal arose out a suit for foreclosure of a mortgage made on the 10th of July 1896 by the defendants, Kamod Singh, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh, the last two of whom were minors on that date and executed the document through their guardian, Kamod Singh. The defendants Nos. 6 and 7 are the sons of Kamod Singh and were made parties as members of a joint Hindu family. The defendants, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh are the sons of Gandharp Singh, who died in 1891. Under the Jhansi Incumbered Estates Act, No. XVI of 1882, Kamod Singh and Gandharp Singh had been declared to be disqualified proprietors, and admittedly were so when they executed the mortgage in suit. The court of first instance (Subordinate Judge of Jhansi) on this ground refused to grant a decree for foreclosure, but passed a decree for money against Bhagwant Singh and Ratan Singh two of the sons of Gandharp Singh. The plaintiff appealed to the High Court, contending that she was entitled to a decree for foreclosure, and the defendants Bhagwant Singh and Ratan Singh filed objections under section 561 of the Code of Civil Procedure contending that the claim for a money decree against them was barred by limitation.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the appellant.

Mr. *Karamat Husain*, for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for foreclosure of a mortgage made on the 10th of July 1896 by

* First Appeal No. 221 of 1905 from a decree of Pramatha Nath Banerji, Subordinate Judge of Jhansi, dated the 22nd of May 1905.

the defendants, Kamod Singh, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh, the last two of whom were minors on that date and executed the document through their guardian, Kamod Singh. The defendants Nos. 6 and 7 are the sons of Kamod Singh and have been made parties as members of a joint Hindu family. The defendants, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh are the sons of Gandharp Singh, who died in 1891. Under the Jhansi Incumbered Estates Act, No. XVI of 1882, Kamod Singh and Gandharp Singh had been declared to be disqualified proprietors. One of the disabilities attaching to this declaration was that those persons were incompetent to mortgage their proprietary rights in land or any part thereof [see section 8, clause (*c*) (1)]. Under section 28, clause (*b*) of the Act, this disability extended to any person succeeding to the proprietary rights of those persons, and therefore to the sons of Gandharp Singh after his death. It is an admitted fact that at the date of the execution of the conditional sale deed in question, the executants of that document were labouring under this disability. The Court below has on this ground refused to enforce the deed and grant a decree for foreclosure: but it has made a decree for money against Bhagwant Singh and Ratan Singh, two of the sons of Gandharp Singh, apparently overlooking the provisions of section 28 to which we have referred above. If a money decree could be passed against those persons, there is no reason why a similar decree should not have been passed against Kamod Singh. The plaintiff appeals from the decree of the lower Court and contends that, having regard to the provisions of section 43 of the Transfer of Property Act, she was entitled to a decree for foreclosure, inasmuch as the mortgagors were subsequently released from disability on the 3rd of November 1896. In our opinion this plea cannot prevail. The consideration for the loan was the mortgage of their property by the disqualified proprietors. Such a mortgage being forbidden by the provisions of the Jhansi Incumbered Estates Act, the consideration was one forbidden by law. It was also of a nature which if permitted would defeat the provisions of that Act. The agreement therefore was one the consideration of which was unlawful within the meaning of section 23 of the Contract Act,

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and was consequently void. The provisions of section 43 of the Transfer of Property Act cannot be applied to an agreement of this nature. This disposes of the first plea taken in the memorandum of appeal. The second plea is that the plaintiff is in any event entitled to a money decree against the respondents Nos. 1 to 5. This plea might have prevailed had the claim for a money decree not been barred by the law of limitation. The bond provides that the amount secured by it is to be repaid by annual instalments of Rs. 700, half of which is to be repaid on the 15th of Pus Sudi and the other half on the 15th of Jeth Sudi every year. It further provides that on the instalments remaining unpaid for two years the mortgagors shall pay the whole of the amount together with interest in a lump sum. It is admitted that no instalment was paid. The last of the two years' instalments became payable on the 4th of June 1898. Therefore under the terms of the bond the whole amount secured by it became payable on that date and time began to run under article 75, schedule II of the Limitation Act, from that date. There is no question of waiver in this case. As the suit was not brought until after the expiry of six years from the date on which the whole amount of the debt became due, the claim for a money decree was barred. In this view the second plea taken in the memorandum of appeal must fail and the objection raised on behalf of the respondents under section 561 of the Code of Civil Procedure must prevail, the result being that the plaintiff's suit must stand dismissed. We accordingly dismiss the appeal with costs, and, allowing the objections under section 561 with costs, dismiss the plaintiff's suit. We do not interfere with the order of the Court below in regard to the costs of the defendants in that Court.

Appeal dismissed.